Supreme Court, U.S.
FILED

99587 OCT 4 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OMER GLAVAN and DIANE GLAVAN, his wife,

Petitioners,

v.

OMI CORPORATION, INC.; OMI LEADER TRANSPORT, INC.; and NORDIC DIESEL AND MACHINE COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

KENNETH HELLER
Attorney for Petitioner
291 Broadway
Suite 1407
New York, New York 10007
(212) 962-6085

QUESTIONS PRESENTED

1. Whether Congress, in enacting the 1972 amendments to the Longshoremen and Harbor Workers' Compensation Act, intended to bar a *Sieracki* seaman's claims against the shipowner for negligence and unseaworthiness under the General Maritime Law, where the shipowner remained in exclusive command and control of the vessel and the performance of the *Sieracki* seaman?

2. Whether a *Sieracki* seaman is a "member of the crew" and thus excluded from the Longshoremen and Harbor Workers' Compensation Act, where he is a borrowed servant under the complete command and control of the shipowner?

3. Whether a maritime worker, who demonstrates *Sieracki* seaman status, is entitled to plead alternative remedies under the Longshoremen and Harbor Workers' Compensation Act, the Jones Act and/or the General Maritime Law?

4. Whether coverage under the Longshoremen and Harbor Workers' Compensation Act and receipt of benefits forever bars a *Sieracki* seaman from remedies under the Jones Act and the General Maritime Law regardless of the facts?

5. Whether the trial court erred when it dismissed the Petitioner's claims for unseaworthiness and negligence under the General Maritime Law during trial by jury, after three days of testimony?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vii

Preliminary Statement 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved . 2

Statement of the Facts 5

The Proceedings Below 8

Reasons for Granting Writ 12

I. Petitioner Was A *Sieracki* Seaman Under The Command And Control Of The Shipowner At The Time Of His Injuries, And He Is Entitled To Pursue Claims Of Negligence And Unseaworthiness Under The General Maritime Law. 17

Contents

Page

II. The Trial Court Committed Reversible Error By Finding That The Petitioner's Receipt Of LHWCA Benefits Comprised An Election Of Remedies. 20

III. The Petitioner Was Wrongfully Deprived Of His Right To A Jury Determination Of His Status And His Cause Of Action For Negligence. 22

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981) 18

Blancq v. Hapag-Lloyd A.G., 986 F. Supp. 376 (E.D. La. 1997) 18

Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S. Ct. 2172 (1995) 18

Clark v. Solomon Navigation, Ltd., 631 F. Supp. 1275 (S.D.N.Y. 1986) 19

Coats v. Penrod Drilling Corp., 785 F. Supp. 614 (S.D. Miss. 1992, *aff'd*, 61 F.3d 1113 (5th Cir. 1995) 19

Cormier v. Oceanic Contractors, Inc., 696 F.2d 1112 (5th Cir. 1983), *cert. denied*, 464 U.S. 821, 104 S. Ct. 85 (1983) 18, 19

Guilles v. Sea-Land, 12 F.3d 381 (2d Cir. 1993) .. 21

Kakavas v. Flota Oceanica Brasileira, 789 F.2d 112, 117 (2d Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 186 (1986) 23

Laakso v. Mitsui & Co., USA, Inc., Civ. A. No. 88-2450, 1989 WL 149186 (E.D. La.) 19

McDermott v. Wilander, 498 U.S. 337, 111 S. Ct. 807 (1991) 22

Cited Authorities

Page

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 10

Normile v. Maritime Co. of Philippines, 643 F.2d 1380 (9th Cir. 1981) 18

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232 (1956) 12

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 145 U.S. 156, 101 S. Ct. 1614 (1981) 13, 17

Sea-Land Service, Inc. v. Gaudet, 414 U.S. 573 (1974), 94 S. Ct. 806 8

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946) ..... *passim*

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S. Ct. 486 (1991) 14, 15, 16, 20, 21

Statutes:

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1333 3

33 U.S.C. § 902 3

33 U.S.C. § 905 3

Cited Authorities

	Page
33 U.S.C. § 905(b)	2, 4, 23
46 U.S.C. § 391	6
46 U.S.C. § 395	6
46 U.S.C. § 1688	8

Other Authority:

1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-27	18

TABLE OF APPENDICES

Page

Appendix A — Decision And Order Of The New York Supreme Court, Appellate Division, First Department Dated And Entered April 7, 1998 ..... 1a

Appendix B — Order Of The Supreme Court Of The State Of New York, New York County Dated February 8, 1996 ..... 3a

Appendix C — Opinion Of The Supreme Court, New York County, Individual Assignment, Part 30 Dated August 6, 1993 ..... 6a

Appendix D — Decision Of Helen E. Freedman, J.S.C. Dated November 24, 1987 ..... 11a

Appendix E — Opinion Of The Supreme Court, New York County, Individual Assignment, Part 30 Dated July 15, 1987 And Filed July 23, 1987 ..... 12a

Appendix F — Order Of The State Of New York, Court Of Appeals Denying Motion For Reargument Dated July 6, 1999 ..... 15a

PRELIMINARY STATEMENT

Omer Glavin, by his attorney Kenneth Heller, Esq., Petitions for a Writ of Certiorari to review the April 7, 1998 Decision/Order of the Supreme Court of the State of New York, Appellate Division, First Department, which affirmed the February 8, 1996 Order of the Supreme Court, New York County (Braun, J.) dismissing the Petitioner's claims for negligence and unseaworthiness under the General Maritime Law.

OPINIONS BELOW

The opinion and Order of the Supreme Court, New York County Appellate Division, First Department, is reported at 249 A.D.2d 42, 670 N.Y.S.2d 771 (1st Dept. April 7, 1998). The opinion and Order of the Appellate Division is reprinted as Appendix A.

The decisions and orders of the lower court are not officially reported and are reprinted at Appendices B, C, D, and E.

The Order of the New York State Court of Appeals, dismissing Petitioner's motion for leave to appeal is reported at 93 N.Y.2d 895, 712 N.E.2d 113, 690 N.Y.S.2d 175 (April 29, 1999), and the Order of the New York State Court of Appeals, denying rehearing on July 6, 1999 is not officially reported and is reprinted at Appendix F.

STATEMENT OF JURISDICTION

The decision and Order of the New York State Supreme Court, Appellate Division, First Department was entered on April 7, 1998, affirming the Order below, dismissing Petitioner's Second Amended Complaint in its entirety. (1a-2a).

Due to ambiguities within the April 7, 1998 decision, Petitioner moved for clarification and to stay the time for reargument and/or leave to appeal to the Court of Appeals. An interim stay was granted on April 20, 1998, but clarification was denied on September 17, 1998.

Petitioner's subsequent motion for reargument, or in the alternative, for leave to appeal to the Court of Appeals from the April 7, 1998 Order of the Appellate Division, First Department was denied on January 26, 1999.

Petitioner subsequently moved for leave to appeal to the Court of Appeals, which was dismissed on April 29, 1999. Petitioner subsequently moved to reargue, but the Court of Appeals denied reargument on July 6, 1999.

This Petition for a Writ of Certiorari is filed within ninety days of the entry of the July 6, 1999 Order of the Court of Appeals, denying rehearing of Petitioner's motion for appellate review. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises under the General Maritime Law and involves the relationship between the General Maritime Law and the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) ("LHWCA"), as to *Sieracki* seamen, who are under the complete command and control of the vessel, which has not been "turned over" to a stevedore.

The Savings to Suitors Clause states, in pertinent part:

> 28 U.S.C. § 1333 Admiralty, maritime and prize cases
>
> The district court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> > (1) Any civil case of admiralty or maritime jurisdiction, saving to suitor in all cases all other remedies to which they are otherwise entitled.

The relevant provisions of the LHWCA at bar states:

> § 902. Definitions
>
> When used in this chapter —
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include —
>
> > (G) a master or member of a crew of any vessel. . . .
>
> § 905. Exclusiveness of liability
>
> (b) Negligence of vessel
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to

> recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

STATEMENT OF THE FACTS[1]

Petitioner, Omer Glavin, was employed as an "outside machinist" of Respondent Nordic Diesel and Machine Company, Inc. ("Nordic Diesel"). (R 1030-33). Nordic Diesel was a shoreside contractor who supplied various shipboard services to United States flag shipowners so that their vessels could maintain, *inter alia*, their "seaworthy certificates" while conducting inspections at anchor or underway at sea. (R. 586, 1029-1030, 1079, 1222-1226).[2] Nordic Diesel designated certain employees as "outside machinists" due to the fact that they performed eighty-five percent (85%) to ninety percent (90%) of their work on board various clients' deep-sea vessels, both in port and at sea. (R. 1030, 1033).

The services of Nordic Diesel relieved their clients' deep-sea vessels from remaining occupied in port while repairs, inspections and maintenance were performed. (R. 1080, 1343-45, 1346-48). The Petitioner, and other employees of Nordic Diesel, while at sea, were treated and considered as temporary crew members while aboard the assigned vessel. (R. 1086-92); *see also* (R. 1086). (Nordic co-worker stating "[w]e considered as working crew which means that we working aboard the ship so we eat with the crew, sleep with the crew and it's normal to do anything else.")

---

1. Inasmuch as the trial court, on the third day of testimony, summarily dismissed Plaintiff's complaint in its entirety, the record falls far short of containing all of the clearly disputed facts herein. Petitioner respectfully requests that this Court apply the standard of review applicable to a motion to dismiss the pleadings for failure to state a cause of action.

2. Citations to (R.) refer to the Record on Appeal submitted to the New York State Supreme Court, Appellate Division, First Department.

Respondents OMI Leader Transport, Inc. and its parent, OMI Corporation, Inc., were clients of Nordic Diesel and the owners and operators of the OMI Leader, a petroleum transport vessel. (R. 1324-26). The OMI Leader was subject to periodic inspection by the America Bureau of Shipping ("ABS") and the United States Coast Guard ("USCG"). (R. 585, 1329-30, 1433-36). In addition, the OMI Leader required an annual in-depth safety inspection pursuant to 46 U.S.C. §§ 391, 395. (R. 122).

On or about March 4, 1986, Mr. Glavan was assigned to the OMI Leader, which at the time carried the minimum number of officers and crew to comply with its federally issued "Certificate of Inspection." (R. 112). The ship's compliment for navigating at sea was inadequate to perform all the required tasks of an annual safety inspection by the United States Coast Guard. (R. 112, 680-81, 1324-29, 1344-49, 1359-65). Thus, OMI Leader engaged the assignment of Mr. Glavan and other temporary crew members to live and work on board the OMI Leader for purposes of completing the annual inspection. (R. 680-81, 1324-29, 1344-49). Mr. Glavan, and other temporary crewmen from Nordic Diesel, would utilize all the ship's facilities at sea and port during their assignment, including taking all of their meals at sea and living aboard the vessel. (R. 681-82, 1083-86, 1343-56).

The OMI Leader was owned, operated, managed, controlled, equipped and manned by the Defendants-Respondents' officers, crew members and personnel during and after the time that Petitioner was assigned to the vessel. Mr. Glavan and the other Nordic Diesel employees aboard the OMI Leader used the vessel's tools to perform the vessel's work. (R. 1080). They worked side-by-side with the permanent crew of the vessel and received their directions from the chain of

command of the vessel, originating from the First Assistant Engineer, Tybur. (R. 1080, 1310, 1311, 1320, 1352).

Mr. Glavan was familiar with the OMI Leader. On prior occasions, Mr. Glavin was employed as a substitute crew member and assigned to perform various tasks such as a machinist, wiper, oiler, refrigerator mechanic and welder. (R. 1081). On prior occasions, Mr. Glavan had signed "Articles of Agreement," on board the vessel as a crew member. (R. 1054-55). A co-worker of the Petitioner cited prior occasions where the ship left port with himself and Petitioner working on board. (R. 1083) Approximately ninety percent (90%) of the activity by Nordic Diesel employees was performed in the engine room of the ships they were assigned to, including the OMI Leader. (R. 1079-81). Exhibits at trial showed that Glavan was placed on the ship's crew list, and First Assistant Engineer Tybur gave deposition testimony in support of Glavan's status as a member of the crew. (R. 1351-59).

The temporary crew, including the Petitioner, lived and worked on board the OMI Leader from March 4, 1986 through March 6, 1986, while the vessel was at anchor, receiving petroleum cargo (R. 122). Mr. Glavan and his co-workers were participating with crew members in dismantling and exhibiting the ship's propulsion and auxiliary equipment to federal and ABS inspection authorities. (R. 1329-30, 1433-35).

The safety inspection had been ongoing for almost three days. (R. 1055-57, 1089). Seaman Glavan received instructions which had previously been relayed from the Ship's Engineering Officers through his working superior (R. 1080-82, 1089-92). He was called upon to perform a test upon the "Crosby" safety valve (R 1235-43, 1257-63, 1267-69), which had been dismantled (R. 1141-46, 1040, 1057-63), and to replace the valve cover.

As Mr. Glavan approached this machinery (R. 1060-61), the valve suddenly opened, discharged an explosion of high pressure steam, and scalded him on his head and shoulders with superheated steam. (R. 201, 340, 346, 329, 1232, 1337, 1389-91). Mr. Glavan was severely burned as a result, and suffered devastating injuries.

Petitioner consistently maintained that as a borrowed servant and/or temporary crew member entirely within the command and control of the vessel, he was entitled to *Sieracki* seaman status, and General Maritime Law claims for negligence and unseaworthiness against the shipowner.

The trial court, on the third day of trial, dismissed the Petitioner's Second Amended Complaint in its entirety, finding in effect, *as a matter of law*, that Petitioner was covered by the LHWCA, and his receipt of benefits pursuant to the LHWCA barred any claims against the vessel owner for unseaworthiness or negligence pursuant to *Sieracki* and the General Maritime Law. (3a-5a).

THE PROCEEDINGS BELOW

A brief discussion of the pleadings and prior relevant decisions rendered in this matter is necessary in order to give meaning to the instant decision for which Petitioner seeks the review of this Court.

On or about July 29, 1986, Plaintiff-Petitioner commenced an action against the Respondents OMI Corporation, Inc. and OMI Leader Transport, Inc., alleging claims for negligence and unseaworthiness under the General Maritime Law and the Jones Act, 46 U.S.C. § 1688 ("Jones Act"). Petitioner's wife, Diane Glavan brought a claim for loss of consortium pursuant to *Sea-Land Service, Inc. v. Gaudet*, 414 U.S. 573 (1974), 94 S. Ct. 806. (R. 28-36).

On July 15, 1987, the Supreme Court, New York County (Freedman, J.) dismissed the Petitioner's claims for unseaworthiness, and Plaintiff's negligence claims under the Jones Act, noting that counsel for the Petitioner characterized Petitioner as a longshoreman, and finding that the LHWCA provides the exclusive remedies for longshoremen, and bars a claim against the shipowner based upon unseaworthiness. (12a-14a).

Upon reargument on November 24, 1987, the Supreme Court, New York County (Freedman, J.) recognizing Petitioner's argument that the status of the Plaintiff was an issue of fact for the jury to determine, but noting that Petitioner's previous motion contradicted his claim that he was a seaman at the time of the injury, suggested the withdrawal of the prior motion, stating:

> If plaintiff wishes to plead the Jones Act, unseaworthiness and the LHWCA in the alternative, he must withdraw his original motion to dismiss the third party complaint, wherein he asserts that the plaintiff is a longshoreman. (11a).

The prior motion was subsequently withdrawn, and the complaint was amended on or about July 18, 1989 to allege Jones Act negligence, Jones Act unseaworthiness, General Maritime Law unseaworthiness and negligence, and loss of consortium. (R. 73-84). A subsequent Second Amended Verified Complaint stated causes of action for Jones Act and General Maritime Law negligence, Jones Act and General Maritime Law unseaworthiness and loss of consortium. (R.91-104). Both amended complaints also alleged, *inter alia*, that Mr. Glavan was a seaman pursuant to *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946), that Mr. Glavan

was "under the direction and control of the ship's officers, performing a seaman's work," and that Mr. Glavan was "employed as a crew member on board defendant's vessel." (R. 79, 96).

On August 6, 1993 the Supreme Court, New York County (Freedman, J.) granted Defendants-Respondents summary judgment dismissing Plaintiff Diane Glavan's loss of consortium claim, holding that "under [*Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)] a *Sieracki* seaman's spouse cannot bring a loss of consortium claim as part of a Jones Act or general maritime law action." (9a). Significantly, Justice Freedman noted that Plaintiff, who claimed *Sieracki* seaman status, was "only entitled to a general maritime law claim, and not a claim under the Jones Act." (9a, n.2) It bears emphasis, however, that the Court noted Petitioner's "theories of negligence and breach of the owner's warranty of seaworthiness," under the general maritime law.[3] The Court also addressed Petitioner as a "Sieracki seaman" eleven (11) times throughout its decision. *Id.* Defendants made no subsequent objection or motion to strike any portion of the Second Amended Complaint, until trial. To the contrary Respondents served an Answer to the Amended Complaint, dated October 18, 1989 (R. 111-113).

On February 8, 1996, three (3) days after the start of trial in this matter, the Supreme Court, New York County (Braun, J.) granted Defendant-Respondents' motion to dismiss the Plaintiff's entire complaint, and the related third party complaint. (3a-5a) The trial court found:

> (1) that [Glavan] was a person covered under the Longshore and Harbor Workers' Compensation

3. The Court also found that because Glavan claimed *Sieracki* seaman status, that he "implicitly abandoned," his claims under the LHWCA and the Jones Act. (10a, 9a n.2).

> Act ("Longshore Act") 33 U.S.C. §§901 et seq.) for purposes of entitlement to compensation benefits; and (2) that he received such benefits (4a).

The Court also rejected Plaintiff's assertion:

> that (3) despite the Longshore Act §905(b) being by its terms the exclusive remedy of covered employees in a suit such as this one and is against the "vessel", plaintiff was entitled to maintain this suit under non-statutory General Maritime Law for negligence and unseaworthiness which is not available to Longshore Act employees, and, hence, that the limitations on third party rights imposed by Congress in amending the Longshore Act in 1972 by enacting 33 U.S.C. §905(b) did not apply to him. . . . *Id.*

The Supreme Court of the State of New York, Appellate Division, First Department affirmed on April 7, 1998, stating:

> Plaintiff's various claims were properly dismissed upon the basis of his representations at trial that he was not proceeding on certain claims, his earlier withdrawal with prejudice of another claim, and prior orders dismissing the remaining claims [citations omitted]. (1a-2a).[4]

---

4. This decision was, of course, completely erroneous, as Justice Freedman had granted Petitioner's motion to withdraw his prior motion and amend his pleadings to state General Maritime Law claims of negligence and unseaworthiness. Thus, the only applicable "prior order[ ] dismissing the remaining claims," was the August 6, 1993 dismissal of the loss of consortium claim by Justice Freedman. As noted (Cont'd)

Due to the almost complete obscurity of the decision rendered by the Appellate Division, First Department, Plaintiff requested clarification and a stay of the time to move for leave to appeal to the Court of Appeals. An interim stay was granted, but the request for clarification was ultimately denied. Plaintiff moved the Appellate Division, First Department to reargue, or in the alternative, for leave to appeal to the Court of Appeals, which was denied.

The Court of Appeals dismissed Plaintiff's application for leave to appeal, and denied reargument. (R. 15a).

REASONS FOR GRANTING WRIT

THE 1972 AMENDMENTS TO THE LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT WERE NEVER INTENDED TO BAR CLAIMS AGAINST THE VESSEL BY A *SIERACKI* SEAMAN WHO WAS UNDER THE COMPLETE COMMAND AND CONTROL OF THE SHIPOWNER.

The 1972 Amendments to the LHWCA "radically changed" the impact of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946) (allowing longshoreman's claims for unseaworthiness and/or negligence against the shipowner for injuries incurred while loading or unloading) and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232 (1956) (allowing shipowner's claim for indemnification against stevedore for breach of express or

---

(Cont'd)
above, the Court's August 6, 1993 decision correctly notes the continued existence of negligence and unseaworthiness under the General Maritime Law.

implied warranty to handle cargo in a reasonably safe manner.) *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 145 U.S. 156, 164-65, 101 S. Ct. 1614, 1620-21 (1981).

In abrogating the claims recognized in *Sieracki, supra* and *Ryan, supra*:

> [t]he compensation payments due the longshoremen from the stevedore for injuries incurred in the course of his employment were substantially increased; the longshoreman's right to recover for unseaworthiness was abolished; his right to recover from the shipowner for negligence was preserved in §905(b), which provided a statutory negligence action against the ship; and the stevedore's obligation to indemnify the shipowner if the latter was held liable to the longshoreman was abolished. *Scindia, supra*, at 165, 101 S.Ct., at 1621.

The clear Congressional intent embodied within the 1972 amendments to the LHWCA was "to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." *Id.*, at 168, 101 S. Ct., at 1621. Thus, "[a]s a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards." *Id.*, at 170, 101 S. Ct., at 1623.

In view of Congress's obvious intent to vest liability for longshoremen and harbor workers' injuries with their employers under a workers' compensation scheme, and to abrogate the vessel's liability for that which the stevedore controlled, the 1972 amendments made perfect sense.

However, completely absent from the 1972 amendments is the intent to abrogate the shipowner's liability under the General Maritime Law for both negligence *and* unseaworthiness, where there is no stevedore in control of any part of the vessel, but rather, the shipowner controls and operates the entire vessel, as well as the performance of the maritime workers who accomplish the work of the ship.

The instant case demonstrates a narrow exception to the coverage and the exclusive remedies of the LHWCA for maritime workers who primarily serve as substitute or temporary crewmen, under the exclusive command and control of the shipowner, who perform the work of the vessel and aid in its navigation, yet may not achieve the status of Jones Act seamen.

Certiorari is sought not only to reverse the summary dismissal of the Plaintiff's complaint on the third day of trial, but to address whether and to what extent *Sieracki* still offers protection to borrowed servants or substitute members of the vessel's crew.

THE TRIAL COURT'S DISMISSAL BASED UPON THE PETITIONER'S RECEIPT OF LHWCA BENEFITS COMPRISES AN IMPERMISSIBLE ELECTION OF REMEDIES UNDER THIS COURT'S PRECEDENT.

The trial court's three main grounds for dismissal, *to wit*: (1) Glavan's alleged coverage under the LHWCA, (2) his receipt of LHWCA benefits, and (3) the resulting preclusive effect of LHWCA coverage and receipt of benefits, are contrary to this Court's dictate in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486 (1991).

In *Gizoni*, this Court held that as to Jones Act claims:

> it is reversible error to permit an employer to prove that the worker accepted LHWCA benefits while awaiting trial. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37, 84 S.Ct. 1, 3, 11 L.Ed.2d 4 (1963). It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act [citations omitted]. This is so, quite obviously, because the question of coverage has never actually been litigated. *Id.*, at 91, 112 S.Ct., at 493.

The *Gizoni* Court rejected an argument by amicus which "would force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Id.*, at 92, 112 S. Ct., at 494, n.5.

The precedent created by the New York State Supreme Court, and the Appellate Division, First Department in this matter would impermissibly force an injured maritime worker to an election of remedies inconsistent with Congressional intent and the General Maritime Law.

Certiorari is sought to confirm that maritime workers may plead alternative remedies under the LHWCA, Jones Act and the General Maritime Law.

THE TRIAL COURT IMPERMISSIBLY USURPED THE MARITIME WORKER'S RIGHT TO A JURY DETERMINATION OF HIS STATUS.

In addition to confirming a maritime Plaintiff's right to alternative remedies, *Gizoni* also confirms that the status of the maritime employee is for the jury to decide. *Id.*, at 92, 112 S. Ct., at 494.

It bears emphasis that the trial court's summary dismissal of the Petitioner's complaint, after three (3) days of trial results in an incomplete version of facts from which to draw any conclusions as to the Petitioner's status, as a matter of law.

However, even under the facts elicited during the three (3) days of trial, a reasonable jury would have been justified in extending *Sieracki* seaman status to Mr. Glavan, who temporarily lived and worked aboard the OMI Leader as a borrowed crewman, and directly aided in the navigation of the ship by assisting the shipowner to conduct an annual safety inspection.

Certiorari is sought to confirm that maritime workers have the right to a jury determination of their status as Sieracki seamen.

I.

PETITIONER WAS A *SIERACKI* SEAMAN UNDER THE COMMAND AND CONTROL OF THE SHIPOWNER AT THE TIME OF HIS INJURIES, AND HE IS ENTITLED TO PURSUE CLAIMS OF NEGLIGENCE AND UNSEAWORTHINESS UNDER THE GENERAL MARITIME LAW.

As noted above, during the time that Petitioner worked on the OMI Leader, from March 4, 1986 through March 6, 1986, Petitioner was a substitute seaman doing the work of the ship, directly under the exclusive command and control of the shipowner.

Clearly, Congress did not intend, by its passage of the 1972 Amendments to the LHWCA, to deprive maritime workers of their General Maritime Law claims, where the owner had exclusive command and control of its vessel and the maritime worker at the time of his injuries. Rather, the major *quid pro quo* of the 1972 Amendments was to abolish shipowners' absolute liability under the warranty of seaworthiness for indemnification by the stevedore for breach of the implied and/or express warranty. *See Scindia, supra*, at 169, 101 S. Ct., at 1623 n.15 ("[t]hus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act [citations omitted].")

However, the instant Plaintiff was not the employee of a stevedore, nor was he a longshoreman or a harbor worker. Rather, Mr. Glavan was designated by Nordic Diesel as an "outside machinist," inasmuch as he spent eighty-five percent (85%) to ninety percent (90%) of his employment time on various vessels as a substitute crewman under the command and control of the shipowners.

While Petitioner does not bear a relationship to a vessel or fleet of vessels, *see Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172 (1995), sufficient for Jones Act protection, he clearly also falls outside the intended exclusions present in the LHWCA, as he claims he was a "member of the crew," at the time of his injuries, and specifically excluded from LHWCA coverage.

Indeed, "for those workers who 'fall into the crack between seamen and longshore workers,' the *Sieracki* doctrine and the warranty of seaworthiness 'still rule[ ] the sea.' " *Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 376 (E.D. La. 1997) (quoting 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-27, at 347).

In *Blancq*, the Court held that river pilots did not qualify as Jones Act 'seaman,' nor did they fit comfortably within the LHWCA, and therefore, the *Sieracki* doctrine, along with claims for unseaworthiness and negligence under the General Maritime Law, applied notwithstanding the 1972 amendments to the LHWCA. *Id.*

The *Blancq* Court noted the split of authority as to whether any part of *Sieracki* survived the 1972 amendments. *See Normile v. Maritime Co. of Philippines*, 643 F.2d 1380 (9th Cir. 1981) (concluding that the 1972 Amendments entirely abolished the *Sieracki* doctrine); *compare Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981) (holding that under circumstances where the maritime worker is not covered by the LHWCA, he may invoke the *Sieracki* unseaworthiness doctrine against the shipowner); *Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112 (5th Cir. 1983) (foreign worker outside coverage of LHWCA coverage entitled to unseaworthiness remedy), *cert. denied*, 464 U.S. 821, 104

S. Ct. 85 (1983); *Coats v. Penrod Drilling Corp.*, 785 F. Supp. 614, 622-24 (S.D. Miss. 1992) (shore-based worker testing equipment on offshore rig entitled to *Sieracki* claim), *aff'd*, 61 F.3d 1113; *Laakso v. Mitsui & Co., USA, Inc.*, Civ. A. No. 88-2450, 1989 WL 149186 (E.D. La.) (worker outside of LHWCA's coverage retains his *Sieracki* unseaworthiness action); *Clark v. Solomon Navigation, Ltd.*, 631 F. Supp. 1275 (S.D.N.Y. 1986).

In *Clark* the Court noted:

> The 1972 amendments to the LHWCA give no indication of any intent to include within the Act's coverage person's who though not formally "members of the crew," perform the traditional navigational functions of a seaman. If a worker is employed primarily in aid of navigation, he is a "member of the crew" for purposes of exclusion from the LHWCA. McDermott, Inc. v. Boudreaux, 679 F. Supp. 452, 458 (5th Cir. 1982). This is consistent with the pre-1972 interpretation that LHWCA-excluded "members of the crew," as opposed to statutorily covered longshoremen and harbor workers, are to be distinguished by their functions primarily in aid of navigation. See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 260, 60 S.Ct. 544, 549, 84 L.Ed. 732 (1940). 631 F.Supp. 1275, 1282-83.

In the case at bar, the Petitioner was designated an "outside machinist" by virtue of the fact that he performed eighty-five percent (85%) to ninety percent (90%) of his work on board various clients' deep-sea vessels, in port and at sea. While on board, Mr. Glavan performed ninety percent (90%) of his work

in the engine room of the vessels upon which he worked, clearly in aid of their navigation.

Moreover, Petitioner previously served upon the OMI Leader, as a substitute crew member and was assigned to perform various tasks such as a machinist, wiper, oiler, refrigerator mechanic and welder. Mr. Glavan even had signed Articles of Agreement, on board the OMI Leader as a crew member.

Certainly this Plaintiff was not a longshoreman or a harbor worker, and there were sufficient facts pled to allow a jury to conclude that Glavan was a *Sieracki* seaman, entitled to claims under the General Maritime Law for negligence and unseaworthiness.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THAT THE PETITIONER'S RECEIPT OF LHWCA BENEFITS COMPRISED AN ELECTION OF REMEDIES.

The trial court impermissibly found that Glavan's alleged coverage and receipt of benefits under the LHWCA constituted an election of remedies or otherwise estopped the Petitioner from claiming *Sieracki* seaman status.

This Court held otherwise in *Gizoni, supra*, stating:

> we have ruled that where the evidence is sufficient to send the threshold question of seaman status to the jury, it is reversible error to permit an employer to prove that the worker accepted LHWCA benefits while awaiting trial. 502 U.S. 81, 91, 112 S.Ct. 486, 493 (1991).

Necessarily implicit in *Gizoni* is that a maritime worker's alleged coverage and receipt of LHWCA benefits is not to be held as an election of remedies.

In the case at bar, the decision of the trial court, and the ambiguous affirmance by the Appellate Division, First Department, both rely almost exclusively upon Petitioner's alleged coverage under the LHWCA and his receipt of benefits pursuant thereto.

This finding, as a matter of law upon the pleadings, flies in the face of the established precedent of *Gizoni*, and worse, leaves a maritime worker in the untenable position of electing his remedies, rather than pleading alternative remedies, as allowed under both state and federal law, and allowing the jury to determine whether Petitioner was a member of the crew, a *Sieracki* seaman, or a longshoreman. *See e.g. Guilles v. Sea-Land*, 12 F.3d 381, 384-85 (2d Cir. 1993) (noting the pleading of alternative remedies.)

The issue of whether Glavan was covered by the LHWCA's exclusivity provisions is separate and apart from the question of whether he was entitled to plead alternative remedies, which the court impermissibly disallowed.

This result clearly deprived the Petitioner of his day in court, and the opportunity to present compelling evidence that he deserved the protection of the General Maritime Law.

III.

THE PETITIONER WAS WRONGFULLY DEPRIVED OF HIS RIGHT TO A JURY DETERMINATION OF HIS STATUS AND HIS CAUSE OF ACTION FOR NEGLIGENCE.

The Court in finding, after three (3) days of trial, that Petitioner accepted LHWCA benefits, dismissed the complaint as a matter of law. Not only did the court commit reversible error in forcing the Petitioner into an election of remedies, but the dismissal clearly deprived Petitioner of his right to a jury determination as to his status and his cause of action for negligence.

In *McDermott v. Wilander*, this Court noted the indispensable function of the jury as fact finder of a seaman's status, stating:

> If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of the crew," it is a question for the jury . . . [t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it. 498 U.S. 337, 356, 111 S.Ct. 807, 818 (1991); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347, 369, 115 S.Ct. 2172, 2190 (1995); *Offshore Company v. Robison*, 266 F.2d 769, 775 (5th Cir. 1959) ("The determination, therefore, whether a person is a 'member of the crew', a word that has a 'wide range of variation', is a question of fact to be left to the trier of the facts.")

Clearly, Petitioner was entitled to make his case to the jury, so that they would determine his status as a seaman. The Petitioner demonstrated, even on this limited record, sufficient facts to lead a reasonable jury to the conclusion that he was a seaman, entitled to protection of either the Jones Act or *Sieracki* and the General Maritime Law.

Moreover, even if Petitioner was covered exclusively under LHWCA, his General Maritime Law claim for negligence would still survive pursuant to 33 U.S.C. § 905(b).

The trial court below apparently concluded that general maritime law negligence under the LHWCA must have been specifically pled. However, it is clear that LHWCA did not create general maritime law negligence, it merely preserved the claim for LHWCA employees. *See e.g. Kakavas v. Flota Oceanica Brasileira*, 789 F.2d 112, 117 (2d Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 186 ("the longshoreman's action against the shipowner for negligence was *preserved* . . . [emphasis added].")

Thus, the trial court committed reversible error to deprive the Petitioner of his negligence claim based in general maritime law, as clearly pled in the Second Amended Complaint.

Finally, Petitioner emphasizes the harm caused by the trial court below in consistently adhering to the view that he could not, as a matter of law, plead alternative remedies under the Jones Act, LHWCA and *Sieracki* seaman status under the General Maritime Law, destroyed his opportunity to meaningfully present any of Glavan's causes to the jury for their lawful consideration.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

KENNETH HELLER
Attorney for Petitioner
291 Broadway
Suite 1407
New York, New York 10007
(212) 962-6085

APPENDIX

APPENDIX A — DECISION AND ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED AND ENTERED APRIL 7, 1998

Sullivan, J.P., Rosenberger, Williams, Andrias, JJ.

Omer Glavan, et al.,

Plaintiffs-Appellants,

Kenneth Heller

– against –

OMI Corporation, Inc., et al.,

Defendants-Respondents/
Third Party Plaintiffs-Respondents,

Joseph T. Stearns

Nordic Diesel and Machine Company, Inc.,

Third Party Defendant-Respondent.

Order, Supreme Court, New York County (Richard Braun, J.), entered on or about February 8, 1996, which, during trial, dismissed the complaint and the third-party complaint, unanimously affirmed, with costs. Appeal from order, same court (Karla Moskowitz, J.), entered on or about December 1, 1995, which precluded plaintiff from presenting psychiatric evidence at trial, unanimously dismissed, without costs, as moot.

Appendix A

Plaintiff's various claims were properly dismissed upon the basis of his representation at trial that he was not proceeding on certain claims, his earlier withdrawal with prejudice of another claim, and prior orders dismissing the remaining claims (*see*, *Public Adm'r v Frota Oceanica Brasileira*, 222 AD2d 332, *lv dismissed* 88 NY2d 920; *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436; *see also*, Siegel, NY Prac § 448, at 679-680 [2d ed]).

M-900 – *Glavan v Omi Corporation, Inc., et al.*

Motion seeking to strike defendants-respondents' brief and for other related relief denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 7, 1998

s/ Catherine O'Hapau Wolfe
CLERK

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY DATED FEBRUARY 8, 1996

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index No. 27040/86
(Richard F. Braun, J.)

OMER GLAVAN and DIANE GLAVAN, his wife,

Plaintiffs,

– against –

OMI CORPORATION, INC. and OMI LEADER TRANSPORT, INC.,

Defendants/Third Party Plaintiffs,

– against –

NORDIC DIESEL & MACHINE COMPANY, INC.

Third Party Defendant.

ORDER

This matter having been brought before the Court upon the motion of Defendants/Third Party Plaintiffs OMI Corporation, Inc. and Omi Leader Transport, Inc., and third party defendant Nordic Diesel & Machine Company, Inc.,

upon having heard the arguments of the parties, and plaintiff Omer Glavan, by his attorney, having admitted: (1) that he was a person covered under the Longshore and Harbor Workers' Compensation Act ("Longshore Act") 33 U.S.C. §§901 *et seq.*) for purposes of entitlement to compensation benefits; and (2) that he had received such benefits; and Plaintiff having asserted that, (3) despite that Longshore Act § 905(b) being by its terms the exclusive remedy of covered employees in a suit such as this one and is against the "vessel", plaintiff was entitled to maintain this suit under non-statutory General Maritime Law for negligence and unseaworthiness which is not available to Longshore Act employees, and, hence, that the limitations on third party rights imposed by Congress in amending the Longshore Act in 1972 by enacting 33 U.S.C. §905(b) did not apply to him; and for good cause shown, including the fact that plaintiff was taking inconsistent positions to the detriment of defendants and third party defendants which needlessly complicated and prolonged this suit and which could have had the effect of imperiling his entitlement, if any, to additional Longshore Act benefits; and for the reasons set forth by the Court on the Record on January 3, 1996, and Plaintiff's having agreed on the Record on 12/21/95 that the Second Amended Complaint is the Complaint in this action, although it includes causes of action not permitted under Justice Helen Freedman's Order permitting an amended complaint, and Plaintiff's discontinued the first cause of action on the Record on December 14, 1995, it is hereby

ORDERED that the motion of defendants and third party defendant is granted to the extent that the complaint and third-

party complaints in the above captioned matter be and hereby are dismissed.

Dated: New York, New York
February 8, 1996

s/ Richard F. Braun
J.S.C.

APPENDIX C — OPINION OF THE SUPREME COURT, NEW YORK COUNTY, INDIVIDUAL ASSIGNMENT, PART 30 DATED AUGUST 6, 1993

SUPREME COURT : NEW YORK COUNTY
IA : PART 30

Index No. 27040/86

OMER GLAVAN and DIANE GLAVAN, his wife,

Plaintiffs,

– against –

OMI CORPORATION, INC. and OMI LEADER TRANSPORT, INC.,

Defendants/Third Party Plaintiffs,

– against –

NORDIC DIESEL & MACHINE COMPANY, INC.

Third Party Defendant

HELEN E. FREEDMAN, J.:

Defendant/third party plaintiffs OMI Corporation, Inc. and OMI Leader Transport, Inc., (together, "OMI") move to dismiss plaintiff Diane Glavan's loss of consortium claim. Third party defendant Nordic Diesel & Machine Company, Inc. cross moves for the same relief.

Appendix C

Plaintiff Omer Glavan ("Glavan") claims to have been injured while performing repair and maintenance work on board the "OMI Leader", a vessel allegedly owned by OMI. Glavan, who was employed by a third party not named in this litigation, sues the alleged owners of the vessel on theories of negligence and breach of the owner's warranty of seaworthiness.

The moving parties urge dismissal of Diane Glavan's loss of consortium claim based on the holding in *Miles v. Apex Marine Corp.*, 498 US 19 (1990), in which the Supreme Court ruled that a loss of consortium claim cannot be maintained in an action based on the Jones Act, 46 USC §688 *et seq.*, or on a seaman's general maritime claim for breach of the warranty of seaworthiness.[1]

Plaintiffs contend in their papers and in oral argument that, because Glavan was not a true "seaman" but instead a longshore harbor worker engaged in a seaman's work when injured, Diane Glavan may claim loss of consortium under a line of cases distinguishable from *Miles*.

Discussion

The remedies for maritime workers injured in the course of their employment is, in general, divided between those of sea-based maritime workers ("seamen") and land-based maritime workers such as Glavan ("longshoremen"). A true

---

1. *Miles* dealt with a wrongful death claim, but it has been recognized that its holding encompasses non-fatal injury claims as well. *See Michel v. Total Transp., Inc.*, 957 F2d 186, 191 (5th Cir. 1992).

seaman may sue his employer under the Jones Act for injuries sustained as a result of negligence, and may also pursue the traditional maritime claim based on the unseaworthiness of the vessel. *Miles*, 498 US at 29-30. Longshoremen may bring actions for injuries "caused by the negligence of the vessel" under §905(b) of the Longshore and Harbor Workers Compensation Act, 33 USC §901 *et seq.* ("LHWCA"). Under LHWCA §905(b), longshoremen are precluded from bringing any action for breach of the warranty of seaworthiness. *Edmondo v. Compagnie Generale Transatlantique*, 443 US 256, 262 (1979). Longshoremen covered by the LHWCA are also precluded from bringing an action under the Jones Act, because the remedies of those two acts are mutually exclusive. *McDermott Int'l v. Wilander*, 498 US 337, 347 (1991).

Prior to 1972, when LHWCA §905(b) was enacted, a longshoreman who was covered by the provisions of the LHWCA could pursue an action based on the seaworthiness of the vessel, if he was "doing a seaman's work and incurring a seaman's hazards" when injured, because the remedies afforded by the LHWCA were not exclusive. *Seas Shipping Co. v. Sieracki*, 328 US 85, 99 and 101-02 (1946). The 1972 amendment of the LHWCA made the LHWCA's remedies for covered longshoremen exclusive and to a great extent superseded *Sieracki*. *See Edmondo*, 443 US at 262. However, it has been recognized that a person not covered by the LHWCA might still qualify as a "*Sieracki* seaman" and be entitled to bring an action for unseaworthiness. *Aparicio v. Swan Lake*, 643 F2d 1109 (5th Cir. 1981).

Plaintiffs allege that Glavan qualifies as a *Sieracki* seaman, and that the ban to bringing loss of consortium

claims recognized in *Miles* does not apply to *Sieracki* seamen's spouses. They cite *In re Garda Marine, Inc.*, 1992 AMC 1307 (S.D. Fla. 1992) in support of their claim.

The Court disagrees with plaintiffs and holds that, under *Miles*, a *Sieracki* seamen's spouse cannot bring a loss of consortium claim as part of a Jones Act or general maritime law action.[2] The Court in *Miles* sought to "restore a uniform rule" which would apply equally to all wrongful death and injury actions under the Jones Act and the general maritime law (as well as under the Death on the High Seas Act, with which the present decision is not concerned). *Miles*, 498 US at 32. A "*Sieracki* seaman's" unseaworthiness claim is brought under general maritime law, and there is no reason to except it from *Miles'* bar of loss of consortium actions.

Garda, the case cited by plaintiffs, is inapposite. In *Garda*, two non-maritime police officers, who were not covered by the LHWCA, were found to be *Sieracki* seamen because their injuries occurred while performing traditional seaman's work aboard a vessel. 1992 AMC at 1323-26. Plaintiffs incorrectly claim that the *Garda* court "state[d] [that] the rule of *Miles*. . . . denying a widow recovery for loss of consortium in an action by her seaman husband under the Jones Act or the General Maritime law simply does not apply to *Sieracki* seamen"; in fact, the issue is never raised in *Garda*.

---

2. *Sieracki* seaman status only entitles the injured party to a general maritime law claim, and not a claim under the Jones Act. *See Sieracki*; *Aparicio*, 643 F2d at 1113-14. By claiming that Glavan is a *Sieracki* seaman, plaintiffs apparently are abandoning their Jones Act claims.

Appendix C

The only discussion of loss of consortium in *Garda* involves the claims of the family of a longshoreman who was covered by the LHWCA. *Id.*, 1992 AMC at 1328-29. The Court in *Garda* held that *Miles* did not bar loss of consortium claims brought under the LHWCA. *Id.*

For the sake of clarity, the Court notes that Diane Glavan also cannot bring a loss of consortium claim under the LHWCA, because plaintiffs have implicitly abandoned their claims under the statute by claiming that Glavan is a *Sieracki* seaman. *Sieracki* seamen are not covered by the LHWCA. *See Aparicio*, 643 F2d at 1116.

Accordingly, motion and cross-motion for partial summary judgment is granted, and Diane Glavan's for loss of consortium is dismissed.

This constitutes the decision and order of the Court for all purposes.

Dated: August 6, 1993

s/ HEF
J.S.C.

APPENDIX D — DECISION OF HELEN E. FREEDMAN, J.S.C. DATED NOVEMBER 24, 1987

GLAVAN v. OMI CORP

Upon the foregoing papers this motion for reargument is denied. The Court did not base its decision to dismiss portions of plaintiff's complaint on an insistence that plaintiff "elect his remedy", but rather, on the affirmation of plaintiff's attorney and that of the third-party defendant that Omer Glavan was a longshoreman employed by Nordic Diesel and Machine Co., Inc. The LHWCA §§905(a) and 905(b) specifically bar suits by longshoremen against vessels under either the Jones Act or for unseaworthiness.

In his motion to reargue, plaintiff's counsel now asserts that it is a question of fact for a jury to determine whether plaintiff was a longshoreman or a seaman at the time of injury. This directly contradicts the original moving papers.

Thus, the movant has failed to demonstrate that the Court overlooked any relevant fact, misapprehended the law or for any other reason, mistakenly arrived at its determination. If plaintiff wishes to plead the Jones Act, unseaworthiness and the LHWCA in the alternative, he must withdraw his original motion to dismiss the third-party complaint, wherein he asserts that plaintiff is a longshoreman.

This is the decision and order of the court.

Dated: November 24, 1987

H.E.F.
J.S.C.

APPENDIX E — OPINION OF THE SUPREME COURT, NEW YORK COUNTY, INDIVIDUAL ASSIGNMENT, PART 30 DATED JULY 15, 1987 AND FILED JULY 23, 1987

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 30

Index No. 27040/86

OMER GLAVAN and DIANE GLAVAN, his wife,

Plaintiffs,

– against –

OMI CORPORATION, INC., and OMI LEADER TRANSPORT, INC.,

Defendants,

– against –

NORDIC DEISEL & MACHINE COMPANY, INC.,

Third-Party Defendants.

HELEN E. FREEDMAN, J.:

Plaintiff, a longshoreman injured while performing repair work on defendants' vessel, moves to dismiss the third-party complaint against his employer Nordic Diesel & Machine Company, Inc., on the ground that the Longshoreman's Harborworkers' Compensation Act, 33

U.S.C. §901 et. seq., ("LHWCA" or "the Act")[1] specifically bars both direct and indirect claims against employers, where the employees have received compensation under the LHWCA. The motion is supported by the third-party defendant ("Nordic Diesel" or "employer"), who states that it employed plaintiff at the time of the accident and submits proof that it has already compensated plaintiff for his injuries under the terms of the LHWCA.

Defendants in opposing the motion agree that no cause of action exists against plaintiff's employer under the Longshore Harborworkers Compensation Act, but claim that plaintiff's causes of action asserting unseaworthiness and negligence under 46 USC 688, "Jones Act", form the basis for a third-party action against Nordic Diesel. Although defendants' answer states that plaintiff's have failed to state a cause of action under the Jones Act or for unseaworthiness, no cross motion to dismiss these claims is made at this time.

The Longshore Harborworker's Compensation Act is designed in part to compensate longshoremen and harborworkers, who are not crewmembers, for injuries sustained in the course of employment. The Act provides, *inter alia*, that every employer is liable for and must secure payment to his employees under the Act, §904[2], that the liability of employers prescribed in §904 is exclusive,

---

1. The LHWCA was amended in 1986 and renamed the Longshore Harbor Worker's Compensation Act 33 U.S.C. §901.

2. Employees are defined as persons engaged in maritime employment and do not include crew members or masters, §902(3); employers are defined as employers of employees in maritime employment upon navigable waters, §904(4). (Stevedores)

§905(a), that an employee injured in the course of his employment can institute an action against the vessel for negligence and this remedy is exclusive, §905(b), and that an employee may not bring an action against the vessel for unseaworthiness, §905(b).

Since the LHWCA §905(a) specifically bars the third-party complaint against plaintiff's employer, plaintiff's motion to dismiss it must be granted. The causes of action alleged in the complaint must also be dismissed because the remedies under the Jones Act and for unseaworthiness are barred, inasmuch as the statute specifically states that a longshoreman's (plaintiff) exclusive remedy against the vessel (defendants) for the injuries sustained is an action under the LHWCA. See, *Bertrand v. International Mooring & Marine, Inc.*, 700 f.2d 240 (5th Cir. 1983), cert. den., 464 U.S. 1069 (1984).

For the foregoing reasons, plaintiff's motion to dismiss the third-party complaint is granted. Plaintiffs' second cause of action is dismissed, and those portions of plaintiffs' first cause of action which state that plaintiffs' negligence claim is brought under the Jones Act are dismissed with leave to serve an amended complaint properly setting forth a negligence cause of action under the Longshore Harborworker's Compensation Act, within thirty days of service of this order with notice of entry.

This constitutes the decision and order of the Court.

DATED: July 15, 1987

s/ HEF
J. S. C.

APPENDIX F — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DENYING MOTION FOR REARGUMENT DATED JULY 6, 1999

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth ***day of*** July 1999

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 714

Omer Glavan, et al.,

Appellants,

v.

OMI Corporation, Inc., et al.,

Respondents;

Nordic Diesel and Machine Company, Inc.,

Third-Party Respondent.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix F

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court